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In the Supreme Court of the United States

OCTOBER TERM, 1960

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**RADIO & TELEVISION BROADCAST ENGINEERS UNION,
LOCAL 1212, INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

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OPINIONS BELOW

The opinion of the court of appeals (R. 107-112) is reported at 272 F. 2d 713. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 2-14) in the unfair labor practice proceeding are reported at 121 NLRB 1207. The Board's earlier Decision and Determination of Dispute (R. 14-20) is reported at 119 NLRB 594.

JURISDICTION

The court below entered its judgment on December 28, 1959 (R. 113-114). The petition for a writ of certiorari was granted on May 31, 1960, 363 U.S. 802 (R. 114). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*) are as follows:¹

Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

(4) * * * to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal * * * to perform any service, where an object thereof is: * * * (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *

¹ Other provisions of the Act referred to in the Argument, but not directly at issue herein, are set forth in the Appendix, *infra*, pp. 53-56.

Sec. 10 (k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

QUESTION PRESENTED

Section 8(b) (4) (D) of the National Labor Relations Act makes it an unfair labor practice for a labor organization to strike for the purpose of requiring an employer to assign particular work to employees in one labor organization, trade, craft, or class rather than to those in another, unless the employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Section 10(k) of the Act provides that, when an unfair labor practice under Section 8(b) (4) (D) is charged, the Board must first "hear and determine the dispute" out of which such unfair labor practice arose.

The question presented is whether the Board discharges its duty under Section 10(k) to "determine the dispute" by deciding that the striking union is

not entitled to the work because it has no right to it under either (1) an outstanding Board order or certification, or (2) a collective bargaining agreement, or whether; as the court below held, the Board is required to make an affirmative award of the work between the competing employees.

STATEMENT

A. The Board's findings of fact

In 1952, the Board certified respondent as the bargaining representative of all technicians in certain departments of Columbia Broadcasting System ("CBS") (R. 16; 60). The certification, while enumerating several categories of work, made no mention of remote lighting work (*ibid.*).² On May 1, 1956, respondent and CBS executed a collective bargaining agreement which likewise did not cover these work tasks (R. 16; 61-66). Indeed, CBS, in the pre-contract negotiations rejected a demand by respondent for inclusion of that work, just as it rejected a similar demand by IATSE which represented another group of its employees (R. 16; 27-31). Accordingly, the question of remote lighting assignments remained unresolved (R. 16).

The immediate dispute herein arose out of CBS' planned telecast of the Antoinette Perry Awards,

² Remote lighting work involves the lighting of television broadcasts which do not originate in the company's home studios (R. 16; 21).

³ Local 1 of International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO.

scheduled for April 21, 1957, from the Waldorf Astoria Hotel (R. 4; 22-23). On or about April 9, CBS notified respondent that it would assign the remote lighting work for this telecast to its stagehands, who were members of IATSE (R. 4, 16; 21-22).

On April 18, respondent's business manager, Calame, threatened Fitts, vice president of CBS in charge of labor relations, with "trouble" if CBS insisted on assigning the work to IATSE. IBEW International Representative Lighty and respondent's Business Representative Pantell also told Fitts that respondent was entitled to the work and threatened that there would be "trouble" if respondent did not get it (R. 4, 17; 24-26, 41-43).

On the afternoon of April 21, after the IATSE stagehands had installed all necessary lights for that evening's program, the technicians represented by respondent installed duplicate lights (R. 5, 17; 32-34, 54-56). Pantell explained that it was "an IBEW job. If we don't use our lights we are not doing the show" (R. 5, 17; 34, 55-56). CBS Representative Levin advised Pantell that IATSE would operate the lights, and ordered that the duplicate lights be removed. But Bell, as spokesman for the technicians, refused to remove them (R. 5, 17-18; 35-37, 45, 54-57). Pantell called a meeting of the technicians, and thereafter again told CBS that respondent's members would not operate the cameras and necessary incidental equipment if IATSE's lights were used (R. 5, 17; 36-37, 56-60).

The technicians refused to finish installing the necessary equipment, and did not report for the rehearsal scheduled between 6 and 7 p.m. (R. 5, 17-18; 37-38, 57). Finally, at about 10:30 p.m., Levin once more asked the technicians to make pictures, and they again refused (R. 5, 18; 59-60). As a result the scheduled program was cancelled (R. 5, 18; 40).

B. Proceedings before the Board

1. The Section 10(k) proceeding

The unfair labor practice charges, filed in April 1957, alleged that respondent had violated Section 8(b)(4)(D), the "jurisdictional disputes" section of the statute (R. 14-15). Pursuant to the statutory scheme for the handling of jurisdictional disputes, the Board, in June 1957, held the hearing prescribed by Section 10(k) to "hear and determine the dispute" out of which the unfair labor practice charge arose (*ibid.*).

The Board found, on the basis of the facts set forth above, that CBS's assignment of the remote lighting work to its stagehands, who were members of IATSE, was not in contravention of an order or certification of the Board, and that respondent had no contract with CBS that bound CBS to assign the disputed work to its members (R. 18-19). Under these circumstances, the Board found that respondent was not lawfully entitled to force or require CBS to assign remote lighting work to its members rather than to other CBS employees (R. 19).

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The Board directed respondent to notify the Regional Director within ten days whether it would comply with the Board's determination (R. 20).

2. *The unfair labor practice proceeding*

Respondent having refused to comply with the Board's determination (R. 6; 69, 70-71), the General Counsel of the Board, on December 27, 1957, issued a complaint alleging that the strike against CBS violated Section 8(b)(4)(D) of the Act. Included in the evidence adduced at the ensuing unfair labor practice hearing were the official records of the prior Section 10(k) proceeding.

Upon the evidence thus adduced, the Board concluded that respondent violated Section 8(b)(4)(D) by "inducing or encouraging the employees of Columbia Broadcasting System, Inc., to engage in a strike or a concerted refusal * * * to perform service with an object of forcing or requiring [CBS] to assign the work of operating lights on remote television pickups to members of Local 1212 rather than to members of [IATSE]" (R. 9).

The Board entered an order which requires respondent to cease and desist from engaging in, or inducing or encouraging the employees of CBS to engage in, a strike, or other proscribed conduct, where an object thereof is to force or require CBS to assign particular work to members of the respondent union rather than to other employees, except insofar as such action is permitted under Section 8(b)(4)(D). Affirmatively, the order directs re-

spondent to post appropriate notices of compliance (R. 12-14).

C. The decision of the Court of Appeals

The court below denied enforcement of the Board's order on the ground that Section 10(k) requires the Board affirmatively to allocate the work to one of the competing unions or groups as a prerequisite to the issuance of a cease-and-desist order under Section 8(b)(4)(D). In the court's view, it is not enough for the Board merely to determine that the striking union is not entitled to strike for the work by virtue of a contract, or Board order or certification. Section 10(k), the Court held, contemplates "affirmative Board adjudication of disputed work allotments" and the Board's "function is to impose a settlement in the event that the parties are unable themselves to reach agreement" (R. 107-112).

SUMMARY OF ARGUMENT

Section 8(b)(4)(D) of the Act makes it an unfair labor practice for a labor organization to strike in order to force the employer to change his assignment of work from one group of employees to another group, unless the "employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work." Section 10(k) provides that when "it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out

of which such unfair labor practice shall have arisen, unless * * * the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute." The issue here is whether Section 10(k) requires the Board in effect to arbitrate the dispute (as the court below held), or merely to determine whether the striking union is entitled to override the employer's assignment of the work by virtue of an outstanding Board order or certification, or contract, giving it representation rights with respect to employees performing that work. The Board submits that the latter interpretation of Section 10 (k) is the correct one.

A.1. Section 10(k) itself sets forth no standards by which the Board is to determine jurisdictional disputes. Since Section 10(k) is merely a procedural provision it is appropriate to turn to the substantive provision of the Act dealing with jurisdictional disputes (Section 8(b)(4)(D)) for guidance as to a standard. Section 8(b)(4)(D) makes the employer's assignment of the work decisive, unless he "is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work."

The conclusion that this standard, rather than such factors as custom, etc., should govern the Board's determination of the dispute under Section 10(k), is supported by several considerations: First, it is one of the basic premises of the Act that the employer is normally free to decide who his employees shall be and what work they shall perform. Second, were the

Board required in Section 10(k) proceedings to utilize standards other than those specifically set forth in Section 8(b)(4)(D), incongruities would result. Either the 10(k) determination would not constitute a defense to an unfair labor practice proceeding under Section 8(b)(4)(D), in which case the Board's 10(k) determination would be rather pointless, or the plain language of the exception to Section 8(b)(4)(D) would be distorted to permit the procedural provision, 10(k), to modify the substantive provision, 8(b)(4)(D). Third, a further consequence of basing 10(k) determinations on considerations beyond those set forth in 8(b)(4)(D) would be to encourage the very jurisdictional strikes which the Sections were intended to prevent. For unions, by striking and thereby invoking a Section 10(k) proceeding, could obtain rights beyond those afforded by other provisions of the Act. The Board's view of Section 10(k), on the other hand, diminishes the incentive to strike, for the Board is confined to interpreting the effect of a preexisting order or certification, or contract (see p. 22, *infra*), conferring representation rights.

2. Moreover, a Section 10(k) determination in favor of a striking union, based on standards other than those contained in Section 8(b)(4)(D), would permit that union to cause the kind of discrimination proscribed by Sections 8(b)(2) and 8(a)(3) of the Act. The typical situation where a Board order or certification, or a contract, does not cover the striking union's claim to the work is where the latter is an "outside" union which does not represent any of

the employer's employees. To let the outside union's claim to the work prevail on the basis of such factors as custom and tradition, would require the employer to discharge his own employees and replace them with members of the outside union, thereby encouraging membership in the latter in violation of Section 8(a)(3). It is hardly likely that Congress could have intended this result. Indeed, Senator Taft, the chief architect of the 1947 amendments, specifically indicated that Section 8(b)(4)(D) was not intended to supersede the restrictions imposed by Section 8(a)(3). 93 Cong. Rec. 6860, Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), p. 1624. In addition, to read Section 10(k) as requiring the Board affirmatively to award disputed work to the striking union, even absent representation rights thereto, would virtually negate that portion of Section 8(b)(4)(D) permitting an employer to assign work to an unorganized "trade, craft, or class." As a union would generally tend to prevail over an unorganized group on the basis of such factors as custom and tradition, the union would need only to strike in order to overturn the employer's assignment.

3. The Board's interpretation of Section 10(k) also avoids a conflict with Section 303(a)(4) of the Labor Management Relations Act. That provision makes unlawful, for purposes of a private suit for damages under Section 303(b), the identical conduct that is proscribed as an unfair labor practice under Section 8(b)(4)(D) of the National Labor Relations Act. However, although Sections 8(b)(4)(D) and

303(a)(4) are identical in language and require the same elements of proof, the extra procedural step imposed by Section 10(k) is not applicable to a Section 303(a)(4) proceeding. *International Longshoremen's Union v. Juneau Spruce Corp.*, 342 U.S. 237. If the Board were required under Section 10(k) to give effect to factors in addition to those specified in 8(b)(4)(D) and 303(a)(4), the substantive symmetry between those two sections would be impaired. Under 303(a)(4), a strike in derogation of the employer's assignment of the work would be sufficient to establish a violation, absent an order or certification. But if the Board subsequently found that the striking union was entitled to the work on other grounds, it would be sanctioning conduct which had been declared unlawful under Section 303(a)(4).

B. The Board's reading of Section 10(k), first adopted shortly after the provision was added to the Act in 1947, has been consistently adhered to thereafter. "Such specific and established administrative interpretation of the statute . . . 'should not be overruled except for weighty reasons.'" *Commissioner v. Estate of Sternberger*, 348 U.S. 187, 199. Moreover, Congress was aware of the Board's interpretation, and has in effect ratified it. On several occasions, Congress considered amendments that would have changed the Board's interpretation, but did not adopt them.

C. Finally, the Board's interpretation of Section 10(k) has furthered the basic purpose of that Section. The prime objective of Section 10(k) is to en-

courage the private settlement of jurisdictional disputes by the parties, without resort to the Board's processes. Early in the life of the jurisdictional dispute provisions, the Building and Construction Trades Department of the AFL, the Associated General Contractors of America, and various employer associations set up a National Joint Board for the Settlement of Jurisdictional Disputes, which has been effective in settling such disputes in the building and construction industry. Other efforts, too, have been made to settle these disputes without invoking the Board's processes. Furthermore, the Board's records show that, although over 1,100 cases involving an alleged violation of Section 8(b)(4)(D) were closed from the enactment of Section 10(k) in 1947 to July 1959, in only 95 of these was it necessary for the Board to go to a formal hearing under Section 10(k), and in only 14 of them was it thereafter necessary for the Board to issue an unfair labor practice order.

D. The grounds relied on by the court of appeals do not justify its rejection of the Board's interpretation of Section 10(k).

1. The legislative history of Section 10(k) shows that, as originally introduced, the provision gave the Board authority to appoint an arbitrator to determine the jurisdictional dispute, but subsequently this authority was deleted. From this, the court below concluded that Congress contemplated that the Board itself would exercise the arbitrator's function, making an affirmative award based on all the factors which he would normally consider. However, the inference

that Congress, by deleting the power to appoint an arbitrator, left the Board with the arbitrator's task, was drawn by opponents of the bill, who are usually not a reliable guide as to the meaning of the legislation. An equally plausible inference is that Congress recognized that, for the reasons previously set forth, such an arbitration-like decision would bring Section 10(k) into conflict with Section 8(b)(4)(D) and other provisions of the Act, and therefore confined the Board to determining whether the striking union was entitled to claim the work under an outstanding order or certification. Indeed, the statement of Senator Taft mentioned above confirms this conclusion.

2. The court below also erred in concluding that the Board's view of Section 10(k) renders that proceeding pointless. The Board's experience under this Section, as previously shown, demonstrates that it has served the primary function envisioned for it by Congress. It has, in most cases, obviated the necessity for utilizing the Act's procedures to settle jurisdictional strikes. Moreover, in the cases which have gone to a hearing under Section 10(k), a substantial number have been resolved on the basis thereof, without the need for invoking unfair labor practice proceedings. Thus, the informal, non-adversary 10(k) proceeding, which, like the hearing in a Section 9 representation proceeding, is still a part of the investigatory stage of the case, may show that the conclusions reached earlier in the investigation were erroneous and proceedings under Section 8(b)(4)(D) are therefore unwarranted, or that the dispute had in fact been voluntarily adjusted, or was subject

to such adjustment. And, should the Board make a determination on the "merits," the fact that the parties are afforded an opportunity to abide by the 10 (k) determination before conventional unfair labor practice sanctions are resorted to provides an atmosphere more conducive to settlement than having issues relating to the underlying dispute decided in the 8(b)(4)(D) proceeding itself.

3. Finally, there is no merit to the court's suggestion that the Board's rules provided for an arbitration-type 10(k) determination, and the Board was in any event required to adhere to its own rules. The rules, as they existed at the time of the Section 10 (k) proceeding here, did not in fact provide for an arbitration-type determination. They provided, in pertinent part, that the Board would, after the 10(k) hearing, either "certify the labor organization . . . which shall perform the particular work tasks in issue, or . . . make other disposition of the matter." Particularly when viewed in the light of the gloss placed thereon by the Board's decisions, it is apparent that the reference to "certifying" the labor organization which shall perform the tasks was not intended to encompass an affirmative determination in all cases, but merely the situation where the Board would interpret the scope of a. outstanding Board order or certification, or contract, found to govern the work assignment in question.

ARGUMENT

The Board Satisfies the Requirement In Section 10(k) That It "Hear and Determine the Dispute" Out of Which the Unfair Labor Practice Arose By Ascertaining Whether the Striking Union Is Entitled To the Disputed Work By a Board Order or Certification. Or By a Contract. The Board Is Not Required To Determine, On the Basis of Such Factors As Custom, Tradition, Etc., Which of the Competing Unions Should Get the Work.

Introduction

Section 8(b)(4)(D) of the Act, in relevant part, makes it an unfair labor practice for a labor organization or its agents—

to engage in, or to induce or encourage the employees of any employer to engage in, a strike * * * where an object thereof is: * * * forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. * * *

It is clear, as respondent conceded in the court below (R. 108), that its conduct violated the literal terms of Section 8(b)(4)(D). That is, it struck CBS to force it to assign the remote lighting work to its members rather than to members of IATSE, who were also employees of CBS and who were given the work by their employer. And, although both

respondent and IATSE had collective bargaining agreements with CBS, neither agreement covered the particular lighting work at issue, nor did respondent's certification as representative of CBS' technicians.

The issue here is whether the Board's unfair labor practice finding is invalidated by an asserted failure to satisfy the antecedent requirements prescribed by Section 10(h). That Section reads:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless * * * the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

Since the enactment of Section 10(k) in 1947, the Board has consistently held that it satisfies its statutory duty to "hear and determine the dispute" out of which the unfair labor practice arises by ascertaining whether the striking union is entitled to the disputed work by virtue of either an outstanding Board order or certification, or a collective bargaining contract; and that unless one of these conditions is met, the union cannot override the employer's normal right to assign work to employees of its own choosing (see *infra*, pp. 35-40). Applying these set-

tled principles to the facts developed here in the Section 10(k) proceeding, the Board concluded that since respondent had no claim to the remote lighting work under either a Board order of certification, or a contract, it had no right to strike to force or require CBS to assign such work to its members rather than to members of IATSE.

The court of appeals held, however, that this kind of determination does not satisfy the requirements of Section 10(k); that the Section requires the Board to determine on the basis of such factors as custom, tradition, pattern of employment, etc., which of the competing groups should get the work. This view has also been adopted by the Third and Seventh Circuits.⁴ The Board's view, on the other hand, has been explicitly accepted by the Fifth Circuit,⁵ and apparently also by the Ninth.⁶

⁴ *National Labor Relations Board v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Locals 420 and 428 (Hake)*, 242 F. 2d 722 (C.A. 3); *National Labor Relations Board v. United Brotherhood of Carpenters and Joiners of America (Wendnagel)*, 261 F. 2d 166 (C.A. 7).

⁵ *National Labor Relations Board v. Local 450, International Union of Operating Engineers (Sline Industrial Painters)*, 275 F. 2d 408; *National Labor Relations Board v. Local 450, International Union of Operating Engineers (Industrial Painters and Sandblasters)*, 275 F. 2d 413; *National Labor Relations Board v. Local 450, International Union of Operating Engineers (Hinote Electric Co.)*, 275 F. 2d 420.

⁶ See *International Longshoremen's Union v. Juneau Spruce Corp.*, 189 F. 2d 177, 188 (C.A. 9), affirmed, 342 U.S. 237.

We shall show that the Board's settled interpretation of Section 10(k) is correct because it harmonizes the various provisions of the Act dealing with jurisdictional disputes, avoids the serious incongruities that would result if the Board were required to make an affirmative award of the work between competing unions, and effectuates the basic purpose of Section 10(k) of facilitating the voluntary adjustment of jurisdictional disputes.

- A. The Board's interpretation of Section 10(k) harmonizes the various provisions of the statute.

The statutory phrase "hear and determine the dispute out of which such unfair labor practice shall have arisen" itself provides no standards for the Board to apply in making such determination. Accordingly, resort must be had to "the structure of the statute, and the relation, physical and logical, between its several parts" (*Duparquet Co. v. Evans*, 297 U.S. 216, 218). When Section 10(k) is viewed in its interrelation to the other statutory provisions dealing with jurisdictional disputes we submit that it cannot properly be construed to require the Board to award the work between the competing unions.⁷

⁷ It is significant that, when Congress wanted the Board to consider such matters as custom and tradition, it said so explicitly. Thus, in Section 8(b)(5), where the exaction of certain membership fees found to be discriminatory or excessive is made an unfair labor practice, it is expressly provided that:

In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry

* * *

1. *The interrelation between Sections 10(k) and 8(b)(4)(D)*

Section 10(k) is part of the machinery which the statute prescribes for remedying the unfair labor practice defined in Section 8(b)(4)(D).^{*} When a charge alleging a violation of Section 8(b)(4)(D) is filed and investigation reveals that there is reasonable cause to believe that an unfair labor practice has occurred—viz., that the union is striking to compel the employer to make a change in his assignment of work—a complaint is not immediately issued under Section 10(b), as in the usual unfair labor practice case. Instead, by virtue of the additional procedure provided in Section 10(k), the parties are first afforded an opportunity either voluntarily to adjust the underlying dispute or to agree upon methods for such adjustment, or to have the Board make a determination respecting the dispute. Only if the strike continues in derogation of the voluntary arrangement or the Board's determination, is the conventional unfair labor practice procedure under Section 10(b) resumed, with issuance of a complaint followed ultimately by a Board remedial order. See Secs. 102.89-102.93 of the *Board's Rules and Regulations*, pp. 56-59, *infra*; *Herog v. Parsons*, 181 F. 2d 781 (C.A. D.C.), certiorari denied, 340 U.S. 810.

^{*} This is apparent from the provision itself, which comes into play only "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(D) of section 8(b);" and from its location in Section 10, which contains the procedures for the prevention of unfair labor practices.

The aim of Section 10(k) is thus to encourage the parties voluntarily to settle the underlying jurisdictional dispute, and, if there is no voluntary settlement or procedure to adjust the dispute, to have the Board make a determination respecting it. The obvious purpose is to avoid the need for applying the slower and harsher conventional unfair labor practice remedies. Where the dispute is voluntarily adjusted or a method therefor exists—and experience has shown that most disputes have been handled in this way (see pp. 43-46, *infra*)—the Board has no occasion to consider the merits of the dispute. It discharges its function under Section 10(k) merely by ascertaining that an adjustment has occurred, or that there is a voluntary procedure by which all parties to the dispute have agreed to be bound.*

Where, however, there is no voluntary adjustment, then the Board itself must determine the dispute. Since Section 8(b)(4)(D) is the substantive provision of the Act dealing with jurisdictional disputes, it is logical to turn to it for guidance as to the substantive standard to be followed by the Board in carrying out the procedure specified in Section 10(k). Section 8(b)(4)(D) makes it an unfair labor prac-

* Indeed, where an agreed-upon method for voluntary adjustment of the dispute exists and it breaks down, the Board will not redetermine the matter under Section 10(k) but will go directly to the conventional unfair labor practice procedures. See *Wood, Wire and Metal Lathers International Union (Acoustical Contractors Ass'n of Cleveland)*, 119 NLRB 1345 (1958); *Local Union No. 9, Wood, Wire, and Metal Lathers International Union (A. W. Lee, Inc.)*, 113 NLRB 947 (1955).

tice for a labor organization to strike to compel an employer to assign particular work to employees in a particular labor organization, "unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work." The term "order" as used in the Act means a final order issued in an unfair labor practice proceeding,¹⁰ and a certification is, of course, the culmination of a representation proceeding under Section 9. In short, Section 8(b)(4)(D) permits the union to override the employer's assignment only if it has a right to the work flowing from a Board unfair labor practice order, usually one issued under Section 8(a)(5),¹¹ declaring it to be the representative of the employees performing such work, or a certification having similar effect. And, since the right to particular work may arise from a collective bargaining agreement as well as from a Board order or certification, the Board has construed Section 8(b)(4)(D) as also sanctioning a strike to override an employer's work assignment that contravenes a contract.¹²

¹⁰ See *American Federation of Labor v. National Labor Relations Board*, 308 U.S. 401; *Manhattan Construction Co. v. National Labor Relations Board*, 198 F. 2d 320 (C.A. 10).

¹¹ See *National Labor Relations Board v. Knickerbocker Plastic Co.*, 218 F. 2d 917, 921-923 (C.A. 9); *Joy Silk Mills v. National Labor Relations Board*, 185 F. 2d 732, 741-742 (C.A. D.C.), certiorari denied, 341 U.S. 914.

¹² *National Association of Broadcast Engineers and Technicians, CIO*, 105 NLRB 355, 364-365; *Local 173, Wood Wire and Metal Lathers (Newark & Essex Plastering Co.)*, 121 NLRB 1094, 1109, n. 37. See *infra*, p. 38.

The effect of the decision below, however, may be to require the Board, in a Section 10(k) proceeding, to sanction the very conduct that Section 8(b)(4)(D) expressly prohibits. For a striking union which had no claim to the work under a Board order or certification, or a contract, might well establish its right to the work upon the basis of such factors as custom, tradition, etc. If the Board had to make its Section 10(k) determination upon these factors, an award to the striking union would lead to serious incongruities.

On the one hand, it could be held that, despite the Section 10(k) determination upon these factors that a union is entitled to the work, the strike to obtain the work is nevertheless an unfair labor practice—on the ground that it does not come within the narrow categories of strikes permitted by Section 8(b)(4)(D). Under this view, if the employer refuses to accept the Section 10(k) determination, the union could not strike for the work without violating Section 8(b)(4)(D), even though the Board had held that it was entitled to the work. This result would make the entire Section 10(k) proceedings virtually pointless. The alternative possibility is to read Section 8(b)(4)(D) as encompassing, within the category of Board “orders” for violation of which a strike is permissible, the Board determination in the Section 10(k) proceedings. But the validity of a jurisdictional strike necessarily depends upon the situation that exists when the strike occurs, and a strike that is illegal at the outset cannot be retroactively validated by a subsequent Board Section 10(k) deter-

mination. For it is Congress, ~~and not the Board~~, that has prescribed which jurisdictional strikes are permissible. Moreover, the term "order" used in Section 8(b)(4)(D) has a specialized meaning under the Act, i.e., an order entered in an unfair labor practice proceeding (p. 22, *supra*), and thus cannot fairly be expanded to include a Section 10(k) "determination." Finally, had Congress intended in the 1947 Act to change the substantive content of Section 8(b)(4)(D), it would presumably have done so directly, and not indirectly through a procedural provision. The Board's interpretation of Section 10(k) not only avoids these problems but, as we show (*infra*, pp. 43-46), effectuates the basic policy of the Act's jurisdictional dispute provisions of encouraging and facilitating informal settlement of such disputes.

Other important policy considerations also support the Board's position. The employer is usually in the best position to judge which employees are qualified to perform a particular job, and what would constitute the most efficient utilization of his total work force. Indeed, it is one of the basic premises of the Act that the employer is normally free to decide who his employees shall be and what work he shall give them.¹³ "Apart from the restrictions contained in the provisions of the statute relating to employer unfair labor practices, neither the original Act nor the

¹³ See *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45; *Associated Press v. National Labor Relations Board*, 301 U.S. 103, 132; *National Labor Relations Board v. Local 1229, Electrical Workers*, 346 U.S. 464, 474.

amended Act was intended to limit the employer's exercise of these powers." *Local 173, Wood, Wire and Metal Lathers' Union (Newark & Essex Plastering Co.)*, 121 NLRB 1094, 1109.

Furthermore, to permit a Section 10(k) determination to be based on considerations in addition to those set forth in Section 8(b)(4)(D), would encourage the very jurisdictional strikes which the Sections were intended to prevent. For "unions would strike in order to invoke a proceeding under Section 10(k), and thus obtain, by a favorable determination, work assignment rights not afforded them by other provisions of the statute." *Local 173, supra*, 121 NLRB at 1112. On the other hand, if the Board's function under Section 10(k) were confined to interpreting the effect of an order or certification conferring representation rights, the incentive to strike would be diminished. As Senator Taft emphasized, in reply to the President's veto of the bill, which was subsequently overridden (93 Cong. Rec. A-3043, Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), p. 1627):

The President says the bill would force unions to strike if they wish to have a jurisdictional dispute settled by the National Labor Relations Board. This is not so. All the union has to do is to file a petition under the representation section.

In sum, as the Fifth Circuit concluded in *National Labor Relations Board v. Local 450, International Union of Operating Engineers (Sline Industrial Painters)*, 275 F. 2d 408, 412, a construction that

Section 10(k) empowers the Board to go beyond the standard set forth in Section 8(b)(4)(D), "being utterly inconsistent with the entire purpose of the substantive provisions of the law, we think that the language should not be so construed unless no other reasonable construction can be made." And, as we now show, such a construction would collide with other sections of the Act. •

2. Sections 8(a)(3) and 8(b)(2)

The typical situation where a Board order or certification, or a contract, does not cover the striking union's claim to the work is where the latter is an "outside" union which does not represent any of the employer's employees.¹⁴ For example, an employer, whose employees are represented by Union A, is given a contract to perform certain work; Union B, claiming that its members are entitled to the work by custom or tradition, puts various pressures (picketing, etc.) on the employer to obtain the job. To let custom and tradition be the test and thus permit Union B's claim to prevail, would require the em-

¹⁴ See e.g., *Lodge 68 of the International Association of Machinists (Moore Drydock Company)*, 81 NLRB 1108; *International Longshoremen's and Warehousemen's Union; Local No. 16 (Juneau Spruce Corp.)*, 82 NLRB 650; *National Union of Marine Cooks and Stewards (Irwin-Lyons Lumber Co.)*, 82 NLRB 916. The fact that the instant case is one where both of the unions involved represented groups of CBS' employees, does not, as the court below suggested (R. 111), impair the analysis in the text for the usual, rather than the unusual case, should determine the governing principles.

ployer either to discharge his own employees and replace them with employees who are members of Union B, or to abandon the job altogether. Either of these alternatives would cause the employer's employees to be discriminated against because of their membership in Union A, and thereby tend to encourage membership in Union B. Such a result is proscribed by Sections 8(a) (3) and 8(b) (2) of the Act (*infra*, pp. 53-54).

It is anomalous to attribute to Congress the intention to permit the Board to foster through Section 10(k) proceedings the discrimination which the Act was designed to prevent.¹⁵ On the contrary, there is evidence that Congress had no such intention. Thus, as it originally appeared in the Senate Bill, Section 8(b) (4) (D) merely banned strikes to force an em-

¹⁵ The Third Circuit conceded that Sections 8(a) (3) and 8(b) (2) make its contrary view of the Board's duty under Section 10(k) "seem anomalous." *National Labor Relations Board v. United Association of Journeymen*, 242 F. 2d 722, 727. Nor is the anomaly diminished by the explanation of the court below (R. 111) that employees are affected even when the Board, in interpreting a certification or contract under Section 10(k), finds that the work belongs in one bargaining unit rather than another. In such a situation the Board's determination does not license an illegal discrimination, for Section 9 authorizes the union selected by the majority of the employees in an appropriate unit to be the exclusive representative for that unit and the Board's interpretation merely gives effect to the result which Section 9 has previously ordained. Moreover, a union can act as exclusive representative for a particular unit without causing discrimination, for it may undertake to represent the employees already assigned to the work without requiring them to become union members.

ployer "to assign to members of a particular labor organization work tasks assigned * * * to members of some other labor organization."¹⁶ In conference, the provision was expanded to include disputes over work assignments to "a particular trade, craft, or class"—an addition which was criticized on the ground that it would enable an employer to undermine craft unions in the plant by assigning work to unorganized groups of employees.¹⁷ In a supplementary analysis of the Conference Bill, Senator Taft, answering this criticism, stated as follows: ¹⁸

this is not a proper criticism of this section since under the Labor Relations Act at the present time an employer would be violating subsection 8(3) if he discharged or discriminated against some employees merely to provide work to members of a union * * *. If an employer discriminates in the assignment of work so as to encourage a non-union group by assigning them work which properly should be performed by union employees, it would be an unfair labor practice under the provisions of existing law and the conference bill. In other words *all that this amendment to the Senate bill does is to make it illegal for unions to coerce employers into doing something which an employer is already prevented from doing by operation of section 8(3) of the present Wagner Act.* [Emphasis added.]

¹⁶ Sec. 8(b)(4)(4) of S. 1126, as reported, Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), p. 113.

¹⁷ 93 Cong. Rec. 6503, 6513-6514, Leg. Hist. 1579, 1589.

¹⁸ 93 Cong. Rec. 6860, Leg. Hist. 1624.

It should also be noted that, if factors such as custom or tradition were to be relevant in a Board determination under Section 10(k), the amendment to Section 8(b)(4)(D) permitting an employer to assign work to an unorganized "trade, craft, or class" could be seriously weakened. For, on the basis of those factors, a union would generally tend to prevail over an unorganized group. Hence, where work was assigned to an unorganized group,¹⁹ a union would need only to strike in order to overturn the employer's assignment.

3. Section 303(a)(4)

So far as relevant here, Section 303(a)(4) of Title III of the Labor Management Relations Act of 1947 provides that:

It shall be unlawful for the purposes of this section only,²⁰ in an industry or activity affecting commerce, for any labor organization to engage in * * * a strike * * * where an object thereof is—

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another

¹⁹ See *William Fargo, Business Agent, Local 30, United Brotherhood of Carpenters (New London Mills)*, 91 NLRB 1003 (1950).

²⁰ The phrase "for purposes of this section only" was included to avoid any possibility that persons violating the Section could be prosecuted under federal conspiracy statutes. 93 Cong. Rec. 4859-4860, Leg. Hist. 1373-1374.

labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. * * *

Section 303(b), in turn, gives a right to anyone injured by such conduct to sue for damages in the district courts of the United States.

It was not coincidence that the language of Section 303(a)(4) is identical with that of Section 8(b)(4)(D). The legislative history shows that Congress intended that Section 303 would give "persons injured by boycotts and jurisdictional disputes described in the new section 8(b)(4) of the National Labor Relations Act a right to sue the labor organization responsible therefor * * *." H. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess., p. 67, Leg. Hist. 571. See also, 93 Cong. Rec. 4858, Leg. Hist. 1371. Congress, in Section 303(a)(4), was not creating a new or different violation of law, but was merely adding an additional remedy of damages for the conduct proscribed in Section 8(b)(4)(D), which was subject to a Board cease-and-desist order and a temporary injunction.

The relation between the two provisions is shown by *International Longshoremen's Union v. Juneau Spruce Corp.*, 342 U.S. 237. There the employer assigned certain work to members of the Woodworkers Union, with whom it had negotiated a collective bargaining contract. The Longshoremen's Union, an "outside" union, demanded that its members be as-

signed this work, and, when the employer refused, the Longshoremen began to picket the plant. The employer filed charges with the Board alleging a violation of Section 8(b)(4)(D), and sued for damages in a district court under Section 303(a)(4).

The Board, in its determination of the dispute pursuant to Section 10(k), found there, as here, that, since the striking union was not entitled to the work under an outstanding Board order or certification, or contract, it had no lawful right to force or require the employer to assign the work to its members (82 NLRB 650, 660). In doing so the Board stated the governing consideration which has consistently been its guide in subsequent cases (p. 660):

As we read Sections 8(b)(4)(D) and 10(k), these sections do not deprive an employer of the right to assign work to his own employees; nor were they intended to interfere with an employer's freedom to hire, subject only to the requirement against discrimination as contained in Section 8(a)(3). In the instant case, where a union with no bargaining or any representative status made demands on the Company for the assignment of work to its members to the exclusion of the Company's own employees, the question of tradition or custom in the industry is irrelevant.

In the meantime, the District Court had awarded the employer damages for the strike, on the ground that it violated Section 303(a)(4). The striking union appealed to the Ninth Circuit, contending that its picketing could not be held illegal under Section 303(a)(4) until the Board had first made a deter-

mination as to who was entitled to the work, under Section 10(k), and had found the picketing to constitute an unfair labor practice under Section 8(b)(4)(D). The Union argued further that, if damage actions were permitted prior to such a Board determination under Section 10(k), it might lead to the incongruous result of permitting damages to be assessed under Section 303(a)(4) for conduct which the Board might later find did not violate Section 8(b)(4)(D). The Ninth Circuit rejected this contention and sustained the judgment of the District Court on the ground that the damage remedy was not dependent on the Board remedy. Citing the passage quoted above, the Ninth Circuit pointed out, however, that the incongruous results feared by the striking union were unlikely since the Board's position respecting its function under Section 10(k) was harmonious with the provisions of Section 8(b)(4)(D) and Section 303(a)(4), i.e., it would not override the employer's assignment absent a failure to conform to a Board order or certification determining the striking union to be the representative of employees performing the work in dispute. Indeed, the Court added (189 F. 2d 177, at 188):

* * * under the plain language of Section 8(b)(4)(D) we are unable to see how the Board in a Section 10(k) proceeding could make a determination adverse to the assignment of the work by [the employer].

The striking union then brought the case to this Court, which affirmed the Ninth Circuit. The Court stated (342 U.S. at 243-244):

Section 8(b)(4)(D) and § 303(a)(4) are substantially identical in the conduct condemned. Section 8(b)(4)(D) gives rise to an administrative finding; § 303(a)(4) to a judgment for damages. The fact that the two sections have an identity of language and yet specify two different remedies is strong confirmation of our conclusion that the remedies provided were to be independent of each other * * *. The fact that the Board must first attempt to resolve the dispute by means of a § 10(k) determination before it can move under § 10(b) and (c) for a cease and desist order is only a limitation on administrative power * * *. These provisions, limiting and curtailing the administrative power, find no counterpart in the provision for private redress contained in § 303(a)(4). * * *

The right to sue in the courts is clear, provided the pressure on the employer falls in the prescribed category which, so far as material here, is forcing or requiring him to assign particular work "to employees in a particular labor organization" rather than to employees "in another labor organization" or in another "class."
* * *

The Court concluded with these words (at 245):

Petitioners, representing one union and employing outside labor, were trying to get the work which another union, employing mill labor, had. That competition for work at the expense of employers has been condemned by the Act. Whether that condemnation was wise or unwise is not our concern. It represents national policy which has *both administrative and conventional legal sanctions*. [Emphasis supplied.]

From the foregoing, it would appear that, contrary to the view of the court below (R. 111), this Court regards the substantive content of Sections 8(b)(4)(D) and 303(a)(4) as *in pari materia*, i.e., both require the same elements of proof to establish violation. However, before the Board may exercise its remedial power, it must, unlike the court in a 303(a)(4) proceeding, first go through the extra procedural step imposed by Section 10(k). This substantive symmetry between 8(b)(4)(D) and 303(a)(4) would be impaired if the Board were required under Section 10(k) to give effect to factors in addition to those specified in 8(b)(4)(D) and 303(a)(4), viz., whether the striking union is entitled to the work under a Board order or certification. For, under Section 303(a)(4), a strike in derogation of the employer's assignment of the work would be sufficient to establish a violation, absent an order or certification. But, if the Board were then to find under Section 10(k) that the striking union was entitled to the work on other grounds, it would be sanctioning conduct which had been declared unlawful under Section 303(a)(4).

As stated by the Fifth Circuit in *Local 450, supra*, 275 F. 2d at 413, this Court's holding in *Juneau Spruce*

is strongly persuasive, we think, that the requirements of 10(k) are purely procedural, for it seems highly unlikely that Congress would enact a statute permitting an aggrieved person to sue for damages for a jurisdictional strike, with the quality of the strike finally and irrevocably fixed

without any Board determination, and at the same time provide that the same strike would no longer be an unfair labor practice as a basis for seeking injunction if the Board acting as arbitrator assigned the work to the striking union. Under such a construction the work would have been assigned by the Board to the striking union and no violation of 8(b)(4)(D) would exist, but the employer would still have his right to sue for damages because the strike would still be a violation of 303(a)(4). We conclude that Congress did not intend such an anomaly. * * * ²¹

- B. The Board's interpretation of Section 10(k) constitutes a contemporaneous construction which has been consistently adhered to.**

The Board's reading of Section 10(k), first adopted shortly after the provision was added to the Act in 1947 and consistently adhered to thereafter, should

²¹ In *International Brotherhood of Electrical Workers v. National Labor Relations Board*, 341 U.S. 694, this Court recognized that the terms used in Section 8(b)(4) and 303(a) should be interpreted consistently. Thus, in rejecting the contention that the free speech provisions of Section 8(c) imposed limitations upon unfair labor practices committed under Section 8(b)(4)(A), the Court pointed out that Section 8(c) pertained only to unfair labor practices and therefore could not affect the outcome of a suit for damages under the identical language of Section 303. The Court then said (p. 703):

If Section 8(c) were given the effect which petitioners urge, it would limit Section 8(b)(4)(A) so as to give the words "induce or encourage" a meaning in that section different than they have in Section 303. We think that the words are entitled to the same meaning in Sections 8(b)(4) and 303.

be given "peculiar weight [for] it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315. "Such specific and established administrative interpretation of the statute . . . 'should not be overruled except for weighty reasons.'" *Commissioner v. Estate of Sternberger*, 348 U.S. 187, 199. See also, *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137, 152-154.

The first case to come before the Board for a Section 10(k) determination was *Lodge 68 of the International Association of Machinists (Moore Drydock Company)*, 81 NLRB 1108 (March 2, 1949). The Machinists picketed a vessel undergoing repairs by the Company to compel a transfer of the work from the Company's employees, represented by the Steelworkers, to members of the Machinists. A majority of the Board, finding that the Machinists did not have representation rights to the work in question under the contract which it relied on, concluded that it was not entitled to strike for it.²²

²² Two members of the Board dissented. Mr. Murdock was of the view that Section 8(b)(4)(D) was not intended to apply to disputes between an outside union and an incumbent union but only to disputes between two groups of presently employed employees, and that in any event a Section 10(k) hearing should not be held in the situation presented because it would serve no purpose other than to affirm the employer's assignment. Mr. Houston was of the view

This was followed by the *Juneau Spruce* case, *International Longshoremen's and Warehousemen's Union, Local No. 16*, 82 NLRB 650 (April 1, 1949), discussed pp. 30-33, *supra*, where the Board expressly stated that the employer's assignment of the work would not be disturbed, absent a showing by the striking union that it had bargaining or representative rights with respect to employees performing the work; and that the question of tradition or custom in the industry was thus irrelevant (p. 31, *supra*).²³ This view was amplified in *National Union of Marine Cooks and Stewards (Irwin-Lyons Lumber Company)*, 82 NLRB 916 (April 8, 1949), rehearing denied, 83 NLRB 341 (May 3, 1949), which also involved an outside union.

In *Local 26, International Fur and Leather Workers Union (Winslow Bros. & Smith Co.)*, 90 NLRB 1379 (July 27, 1950), the Board made its first affirmative determination in a Section 10(k) proceeding. The Fur Workers and Teamsters each represented different units of the employer's employees, and had separate contracts covering each unit. A dispute arose as to whether the work of moving raw materials among the various buildings of

that, although the conduct was within Section 8(b)(4)(D), the dispute was not the type which the Board should determine under Section 10(k). (81 NLRB at 1120-1128.) The majority's answer to these contentions was that the conduct fell within the express terms of Section 8(b)(4)(D), and that Section 10(k) did not give the Board discretion to pick and choose what disputes it would hear (*Id.*, at 1114-1115).

²³ Members Murdock and Houston dissented, for the same reasons advanced in *Moore Drydock*. (82 NLRB at 660-663.)

the employer's plant fell within the Fur Workers' unit or the Teamsters' unit. The employer had assigned the work to the latter unit, whereupon the Fur Workers' struck. The Board, interpreting the two contracts, concluded that the work in question was included in the Fur Workers' unit.

A similar situation was later presented in *National Association of Broadcast Engineers and Technicians, CIO*, 105 NLRB 355 (June 4, 1953). That case, like the instant one, involved a dispute between two groups of a broadcaster's employees, each represented by a different union, over the assignment of remote lighting work. However, there, unlike here, the Board found that the contract between the employer and the striking union covered that work. Accordingly, it held that the employer, in assigning it to the other union, had acted in derogation of the contract. Rejecting the contention that, since there was no Board order or certification entitling the striking union to the work, the Board lacked power to make a determination based on the contract, the Board stated (105 NLRB at 364):

The Board is persuaded that to fail to hold as controlling herein the contractual preemption of the work in dispute would be to encourage disregard for observance of binding obligations under collective-bargaining agreements, and invite the very jurisdictional disputes Section 8(b)(4)(D) is intended to prevent * * *.

The propriety of the Board's interpretation of Section 10(k) was reexamined in *Local 562, United Association of Journeymen, et al. (Northwest Heat-*

ing Company), 107 NLRB 542 (December 24, 1953). This involved a situation similar to that in *Moore Drydock* and *Juneau Spruce*, where outside unions were striking to obtain work which the employer had assigned to his own employees who were represented by another union. The Board, newly constituted except for Member Murdock, reaffirmed its prior interpretation, stating (107 NLRB at 549-550):

It is now well established that an employer is free to make [work] assignments free of strike-pressure by a labor organization, "unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work." Neither the Plumbers nor the Carpenters [the outside unions] claim to be the certified bargaining representative for employees performing heating, air-conditioning, and refrigeration equipment installation work.

We find, accordingly, that the Plumbers and Carpenters were not lawfully entitled to require Brown and Northwest to assign the disputed installation work to members of the Plumbers rather than to employees of Northwest who are members of the Operating Engineers * * *
[Footnotes omitted.]²⁴

²⁴ Member Murdock dissented for the reasons expressed in *Moore Drydock* and *Juneau Spruce*, viz., that Section 10(k) hearings should be dispensed with in cases of this type since the Board could not arbitrate the dispute and thus the 10(k) proceeding was a futile one (107 NLRB at 552-554). Chairman Farmer, who had by then succeeded Chairman Herzog (the latter participated in the *Juneau Spruce* decision), wrote a special concurring opinion, addressed to this contention. He pointed out that Section 10(k), by directing

Finally, the Board, as presently constituted, re-examined and reaffirmed its original interpretation of Section 10(k) in *Local 173, Wood, Wire and Metal Lathers' International Union (Newark & Essex Plastering Co.)*, 121 NLRB 1094 (September 30, 1958). Summarizing its position, the Board there stated (*Id.*, at 1107-1108): "an employer has the right to make [work] assignments, free of strike pressure, unless the employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work, or the claimant union has an immediate or derivative right under an existing contract upon which to predicate a lawful claim to the work in dispute."

In sum, despite the shifts in the Board's membership, the agency's interpretation of Section 10(k) has been consistent and unvarying during the 13 years that the provision has been in the Act. Moreover, Congress has been aware of the interpretation. Not only was it set forth in the annual reports which the Board submitted to Congress,²⁵ but on several occasions the legislature considered changing it.

Thus, in 1949, hearings were held on a bill, introduced by Senator Thomas, which, *inter alia*, would

the Board to hear and determine the dispute in all cases coming under Section 8(b) (4) (D), deprived the Board of discretion to pick and choose what disputes it would hear (107 NLRB at 550-552).

²⁵ See, e.g., *Fourteenth Annual Report of the National Labor Relations Board* (G.P.O., 1950), pp. 100-104; *Seventeenth Annual Report of the National Labor Relations Board* (G.P.O., 1953), p. 195; *Twenty-second Annual Report of the National Labor Relations Board* (G.P.O., 1958), p. 110.

have revamped the Act's jurisdictional dispute provisions. Jurisdictional dispute was redefined to include only disputes between two labor organizations over the assignment of work; the Board was empowered to hear and determine such disputes or appoint an arbitrator for this purpose, and standards for making the determination, including such considerations as past practice, were specifically provided; and a jurisdictional strike was illegalized only if it persisted after, and contrary to, the terms of the determination by the Board or arbitrator. *Hearings before the Committee on Labor and Public Welfare, U. S. Senate, on S. 249, 81st Cong., 1st Sess., pp. 10-11, 25-26, 122-125.* This would have required the Board to make an affirmative determination of the jurisdictional dispute. To facilitate this result, changes were made in the entire structure of Section 8(b)(4)(D), thereby avoiding the problems which would arise from imposing such a requirement on the present Section 8(b)(4)(D) (see *supra*, pp. 20-26). Gerard Reilly, who was a consultant to the Senate Labor Committee at the time of the 1947 amendments, explained the difference between the proposed revision and the existing provision as follows (*id.*, at 847):

Under section 8(b)(4)(D) of the present act, it is an unfair labor practice to strike to enforce a jurisdictional claim unless the employer is violating a certification or an order of the Board.

The legislative history indicates that they meant a preexisting certification or order.

Under the proposed bill, it is not an unfair labor practice to engage in a jurisdictional

strike, even though the union is not certified, but if the union that loses after there has been an arbitration proceeding, and then defies the jurisdictional award, that then becomes an unfair labor practice.²⁶

The Thomas bill was not enacted.

In 1953, hearings were again held to consider changes in the Act, and witnesses testified both against and in favor of, the Board's interpretation of Section 10(k). See *Hearings before the Committee on Labor and Public Welfare, U. S. Senate, on Proposed Revisions of the Labor-Management Relations Act, 1947*, 83d Cong., 1st Sess., pp. 1330, 1348, 2428-2431. One of the critics was Professor Cox, who recommended a specific amendment which would require the Board to make an affirmative determination of the dispute. *Id.*, at 2427.

Nevertheless, this time, too, Congress left Sections 10(k) and 8(b)(4)(D) intact. And, although it

²⁶ Mr. Reilly was subsequently asked by Senator Taft (*Hearings, op. cit., supra*; p. 848) whether there had "been any difficulty with the jurisdictional-strike cases, any dissatisfaction with them, so far as you know, the treatment under the Taft-Hartley law?" The following colloquy ensued:

MR. REILLY. Well, it seems to have cured them pretty well in the printing industry. There have been almost none in the past year and a half it has been in effect.

SENATOR TAFT. As to the effect of the jurisdictional-strike provision of the Taft-Hartley law, hasn't it been to, in effect, force the unions to arbitrate between themselves and accept the arbitration? That would at least seem to be the story in the building trades.

MR. REILLY. In the building trades; yes, sir.

enacted extensive revisions of the Taft-Hartley Act late in 1959, including amendments to various sections surrounding 10(k)—e.g., 10(j) and 10(l)—and to Section 8(b)(4), no change was made in either the procedural or the substantive provisions respecting jurisdictional disputes. “Under these circumstances it is a fair assumption that by reenacting without pertinent modification the provision with which we here deal, Congress accepted the construction thereon placed by the Board * * *.” *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361, 366.

C. The Board's interpretation has furthered the basic purpose of Section 10(k).

Finally, the Board's view—that the assignment of the work by the employer, absent the exceptions specified in Section 8(b)(4)(D) itself, is the governing factor in the determination of jurisdictional disputes—has furthered the basic purpose of Section 10(k) to encourage the private settlement of jurisdictional disputes by the parties, without resort to the Board's processes. For since Section 10(k) was enacted in 1947, the overwhelming majority of jurisdictional strikes have been settled voluntarily, without resort to 10(k) proceedings.

In May 1948, the Building and Construction Trades Department of the AFL, the Associated General Contractors of America, and various employer associations made an agreement setting up a National Joint Board for the Settlement of Jurisdictional Dis-

putes in the building and construction industry."²⁷ Other efforts, too, have been made to settle these disputes without invoking the Board's processes.²⁸ And, to facilitate compliance with these procedures, the Board has held that, where the parties have agreed to a voluntary method of adjustment, they must follow that procedure and abide by its award; if they do not, the Board will not redetermine the dispute itself, but will immediately invoke the conventional unfair labor practice remedies (see n. 9, *supra*, p. 21).

Records compiled by the Board's Administrative Statistics Branch show that, during the 12-year period from the enactment of Section 10(k) in 1947 to July 1959, 1,181 cases involving an alleged violation of Section 8(b)(4)(D) were closed. In only 95 of these was it necessary for the Board to go to a hearing under Section 10(k). The remaining 1,086 cases were resolved by settlement, by voluntary adjustment of the dispute, or, in some instances, by dismissal of the charge when investigation revealed insufficient basis therefor to warrant a hearing. And of the 95 cases that went to hearing, in 18 the Board thereafter quashed the notice of hearing—in 8 cases because, although investigation had revealed a probable violation of Section 8(b)(4)(D), the facts de-

²⁷ See *Jurisdictional Problems in Construction Industry*, 40 LRRM 18 (July 25, 1957); Rains, *Jurisdictional-Dispute Settlements in the Building Trades*, 8 Lab. L.J. 385, 390-394 (1957).

²⁸ See agreement between IAM and Brewery Workers, 40 LRRM 93; Proceedings of the Third Constitutional Convention of the AFL-CIO, Vol. II, pp. 300-303, 315-316 (1959).

veloped at the hearing showed no possible violation; in 1 case, because the charging party was found to be fronting for a union which had not complied with the filing requirements of Section 9(f), (g) and (h); and in the other 9, because the hearing disclosed that there were in fact agreed-upon methods for voluntary adjustment of the dispute.²⁹

This experience, covering more than a decade, shows that the Board's interpretation has enabled Section 10(k) to achieve its basic purpose of prompting voluntary adjustment of jurisdictional disputes.³⁰ On the other hand, as we have shown (*supra*, p. 25), the court of appeals' interpretation would

²⁹ In the remaining 77 cases which went to Section 10(k) hearing, the Board issued a Decision and Determination of Dispute. 66 involved a finding, as in the instant case, that the striking union was not entitled to strike to force the employer to change its work assignment; in 11, the Board found that the striking union was entitled to the work under an outstanding Board certification or contract. In only 14 of such cases was it thereafter necessary for the Board to issue an unfair labor practice order.

³⁰ See also, *Herzog v. Parsons*, 181 F. 2d 781, 788 (C.A. D.C.), certiorari denied, 340 U.S. 810, where it was pointed out that, on December 31, 1948, the Joint Committee on Labor-Management Relations (created by Sec. 401 of the Labor Management Relations Act) filed a report which states (Rep. No. 986, Part 3, 80th Cong., 2d Sess., p. 57):

The Committee is happy to report that the history of [Section 8(b)(4)(D)] during its 17 months' existence has not been one of Board hearings and orders. The Board has yet to decide a jurisdictional dispute. Formal action has been initiated in three cases.

And note Senator Taft's comments in n. 26, *supra*, p. 42.

encourage the very strikes that Section 10(k) is designed to avoid.

- D. The grounds relied on by the court of appeals do not justify its rejection of the Board's settled interpretation of Section 10(k).**

The court of appeals held that the Board's interpretation of Section 10(k) is contradicted by the legislative history, would serve no useful purpose, and was contrary to the Board's own rules (R. 109-112).³¹ We submit that these arguments are unsound, and do not justify the rejection of the agency's settled administrative construction.

1. The legislative history

Section 10(k), as originally introduced, gave the Board the alternative of hearing and determining the jurisdictional dispute itself or of appointing an arbitrator for that purpose. In conference, the authority to appoint an arbitrator was deleted, a deletion which was criticized on the ground that the faster arbitration procedures were better suited for determining jurisdictional disputes than were Board procedures. See, e.g., 93 Cong. Rec. 6452, Leg. Hist. 1554. (Senator Morse). It is contended that this indicates Congress contemplated that a Board determination of the dispute would involve an affirmative

³¹ The court below limited itself to a "brief summarization" of the legislative history, and referred to *National Labor Relations Board v. United Association of Journeymen*, 242 F. 2d 722 (C.A. 3), where such history is "fully reviewed" (R. 110).

award, based on all of the factors which an arbitrator would normally consider.

But it does not necessarily follow that because Congress eliminated the provision for an arbitrator, it intended the Board to perform an arbitrator's task. The inference that this was so was drawn in the Congress by opponents of the bill,³² who are usually not a reliable guide to the meaning of the legislation.³³ Another equally plausible inference is that the Conference recognized that, for the reasons previously set forth, an arbitration-type decision would bring Section 10(k) into conflict with Section 8(b)(4)(D) and other provisions of the Act. Accordingly, it was decided to confine the Board to determining whether the striking union was entitled to claim the work under an outstanding order or certification. And, since this kind of a determination imposed no special burden on the Board nor involved considerations beyond its competence, there was no longer any need for an arbitrator.

This conclusion is confirmed by Senator Taft's subsequent remarks. He pointed out (pp. 28, 25, *supra*) that Sections 8(b)(4)(D) and 10(k) were not intended to supersede the restrictions imposed by Section 8(a)(3), nor to enable a union, by striking, to obtain more than it could otherwise obtain through the Act's representation procedures. As we have

³² See, e.g., 93 Cong. Rec. 1846, 4034-4036, 4841, 6453, 6506, 7487, Leg. Hist. 985, 1046-1048, 1360, 1554-1555, 1585, 918-919.

³³ See *Mastro Plastics Corp. v. National Labor Relations Board*, 350 U.S. 270, 288.

shown, these results could be achieved only if the Board's Section 10(k) proceeding were limited to the representation questions which it considers therein.

2. *The contention that the Section 10(k) proceeding serves no useful purpose*

Nor does it follow that, under the Board's view, the Section 10(k) proceeding becomes pointless. R. 109; see *United Association of Journeymen, supra*, 242 F. 2d at 726. To be sure, the question of whether the striking union is entitled to claim the work under an outstanding Board order or certification, or contract, could be determined, as a matter of defense, in the 8(b)(4)(D) unfair labor practice proceeding. But a useful purpose is served by having that question determined prior thereto.³⁴

The Section 10(k) proceeding, like a hearing in a representation proceeding under Section 9, is informal and non-adversary. It is still a part of the investigatory stage of the case. The fuller facts developed in the 10(k) hearing may show that the con-

³⁴ Of course, if the issue of whether the striking union has representation rights with respect to employees performing the work is determined in the 10(k) proceeding, there is no need to have two administrative determinations of the question. *National Labor Relations Board v. Local 450, International Union of Operating Engineers*, 275 F. 2d 420 (C.A. 5). For, as in the case of unfair labor practice proceedings which contest the validity of a certification issued in a representation proceeding, issues heard and determined in the latter are not subject to relitigation in the former. See *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U.S. 146; *National Labor Relations Board v. Smythe*, 212 F. 2d 664 (C.A. 5).

clusions reached earlier in the investigation were erroneous, and that proceedings under Section 8(b)(4)(D) are thus unwarranted—e.g., that the union was not in fact striking for objects proscribed by Section 8(b)(4)(D), or that the dispute had in fact been adjusted under voluntary methods, or was subject to such adjustment.³⁵ Moreover, even where it appears that the dispute is one which the Board may properly determine under Section 10(k) and it proceeds to do so, that proceeding serves a function. Its informal nature and the fact that the parties are afforded an opportunity to abide by the 10(k) determination before formal unfair labor practice proceedings are instituted, provide an atmosphere more conducive to settlement than would be the practice of having the 10(k) issues handled in the 8(b)(4)(D) proceeding itself. This is evidenced by the experience cited above (pp. 44-45, *supra*), which shows that in only 14 cases was it necessary for the Board, after it had made a 10(k) determination, to proceed to formal unfair labor practice proceedings.

³⁵ *Ship Scaling Contractors Association*, 87 NLRB 92 (1949); *Communications Workers of America (The Mountain States Telephone and Telegraph Co.)*, 118 NLRB 1104 (1957); *American Wire Weavers' Protective Association (The Lindsay Wire Weaving Company)*, 120 NLRB 977 (1958); *General Warehousemen and Employees Union (Roy Stone Transfer Corp.)*, 99 NLRB 662 (1952); *Local Union No. 9, Wood, Wire, and Metal Lathers International Union (A. W. Lee, Inc.)*, 113 NLRB 947 (1955); *Local Union No. 1, Sheet Metal Workers International Association (Refrigeration and Air Conditioning Contractors Association of the Peoria Area)*, 114 NLRB 924 (1955).

In short, consistent with its purpose, the Section 10(k) proceeding, even under the Board's view thereof, serves the real function of obviating, in most cases, the necessity for utilizing the Act's formal unfair labor practice sanctions to settle jurisdictional strikes.

3. *The Board's rules*

The short answer to the Court's statement (R. 112) that the "Board's own rules * * * recognize its power to allocate disputed tasks" is that the Board rules in effect at the time of the Section 10(k) proceeding here did not in fact provide for an arbitration-type determination. Section 102.73 of those Rules (Series 6, as amended) provided that:

Upon the close of the [Section 10(k)] hearing, the Board shall proceed either forthwith upon the record, or after oral argument, or the submission of briefs, or further hearing, as it may determine, to certify the labor organization, or the particular trade, craft, or class of employees, as the case may be, which shall perform the particular work tasks in issue, or to make other disposition of the matter. [Emphasis supplied.]

Reading this provision in the light of the gloss placed thereon by the Board's decisions (pp. 35-40, *supra*),³⁶ it is apparent that the reference to "certifying" the labor organization or other group which shall perform the particular work task was merely intended to encompass the situation where the Board, finding that the question of work assignment was governed

³⁶ See *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414.

by an outstanding Board order or certification, or contract, would proceed to interpret its scope. Similarly, the phrase "make other disposition of the matter" was intended to encompass the situation where the striking union had no such basis for overriding the employer's work assignment, and the Board would so find. So interpreted, the Board's rules were entirely consistent with the procedure followed here.³⁷

³⁷ To clear up any possible ambiguity in the rule as it previously existed, the Board rephrased this rule on May 14, 1958 (23 F.R. 3259). The relevant language is now part of Section 102.90 (p. 57, *infra*), and reads as follows:

Upon the close of the [Section 10(k)] hearing, the Board shall proceed either forthwith upon the record, or after oral argument, or the submission of briefs, or further hearing, to determine the dispute or make other disposition of the matter. * * *

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the case should be remanded with instructions to enforce the Board's order.

Respectfully submitted.

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SEPTEMBER 1960.

APPENDIX

A. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C., Secs. 151, *et seq.*), in addition to those set forth pp. 2-3, *supra*, are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * *

REPRESENTATIVES AND ELECTIONS

Sec. 9.

* * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10.

* * *

(1) Whenever it is charged that any person has engaged in an unfair labor practice within

the meaning of paragraph (4) (A), (B), or (C) of section 8(b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the pur-

poses of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b) (4) (D).

* * *

B. The relevant provisions of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, effective November 13, 1959 (24 F.R. 9095), are as follows:

RULES AND REGULATIONS

* * *

Subpart F—Procedure to Hear and Determine Disputes Under Section 10(k) of the Act

SEC. 102.89 *Initiation of proceedings.*—Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8(b), the regional director of the office in which such charge is filed or to which it is referred shall investigate such charge and if it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(l) of the act, he shall give it priority over all other cases in the office except other cases under section 10(l) of the act and cases of like character.

SEC. 102.90 *Notice of hearing; hearing; proceedings before the Board; briefs; determination of dispute.*—If it appears to the regional director that the charge has merit and the parties to the dispute have not submitted satisfactory evidence to the regional director that they have adjusted, or have agreed upon methods for the voluntary adjustment of, the dispute out of which such unfair labor practice shall have arisen, he shall cause to be served on all parties to such dispute a notice of the filing of said charge together with a notice of hearing under section 10(k) of the act before a hearing officer at a time and place fixed therein which shall be not less than 10 days after service of the notice of hearing. The notice of hearing shall contain a simple statement of the issues involved in such dispute. Such notice shall be issued promptly, and in cases in which it is deemed appropriate to seek injunctive relief pursuant to section 10(l) of the act, shall normally be issued within 5 days of the date upon which injunctive relief is first sought. Hearings shall be conducted by a hearing officer, and the procedure shall conform, insofar as applicable, to the procedure set forth in sections 102.64 to 102.67, inclusive. Upon the close of the hearing, the Board shall proceed either forthwith upon the record, or after oral argument, or the submission of briefs, or further hearing, to determine the dispute or make other disposition of the matter. Should any party desire to file a brief with the Board, seven copies thereof shall be filed with the Board at Washington, D. C., within 7 days after the close of the hearing. Immediately upon such filing, a copy shall be served on the other parties. Such brief shall be legibly printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be

accepted. Requests for extension of time in which to file a brief under authority of this section shall be in writing and received by the Board in Washington, D. C., 3 days prior to the due date with copies thereof served on each of the other parties. No reply brief may be filed except upon special leave of the Board.

SEC. 102.91 *Compliance with determination; further proceedings.*—If, after issuance of the determination by the Board, the parties submit to the regional director satisfactory evidence that they have complied with the determination, the regional director shall dismiss the charge. If no satisfactory evidence of compliance is submitted, the regional director shall proceed with the charge under paragraph (4) (D) of section 8(b) and section 10 of the act and the procedure prescribed in sections 102.9 to 102.51, inclusive, shall, insofar as applicable, govern.

SEC. 102.92 *Review of determination.*—The record of the proceeding under section 10(k) and the determination of the Board thereon shall become a part of the record in such unfair labor practice proceeding and shall be subject to judicial review, insofar as it is in issue, in proceedings to enforce or review the final order of the Board under section 10(e) and (f) of the act.

SEC. 102.93 *Alternative procedure.*—If, either before or after service of the notice of hearing, the parties submit to the regional director satisfactory evidence that they have adjusted the dispute, the regional director shall dismiss the charge and shall withdraw the notice of hearing if notice has issued. If, either before or after issuance of notice of hearing, the parties submit to the regional director satisfactory evidence that they have agreed upon methods

for the voluntary adjustment of the dispute, the regional director shall defer action upon the charge and shall withdraw the notice of hearing if notice has issued. If it appears to the regional director that the dispute has not been adjusted in accordance with such agreed-upon methods and that an unfair labor practice within the meaning of section 8(b)(4)(D) of the act is occurring or has occurred, he may issue a complaint under section 102.15, and the procedure prescribed in sections 102.9 to 102.51, inclusive, shall, insofar as applicable, govern; and sections 102.90 to 102.92, inclusive, are inapplicable.

* * * *

STATEMENTS OF PROCEDURE

* * * *

Subpart F—Jurisdictional Dispute Cases Under Section 10(k) of the Act

SEC. 101.31 *Initiation of proceedings to hear and determine jurisdictional disputes under section 10(k).*

—The investigation of a jurisdictional dispute under section 10(k) is initiated by the filing of a charge, as described in section 101.2, by any person alleging a violation of paragraph (4)(D) of section 8(b).

SEC. 101.32 *Investigation of charges; withdrawal of charges; dismissal of charges and appeals to Board.*

—These matters are handled as described in section 101.4 to 101.7, inclusive. Cases involving violation of paragraph (4)(D) of section 8(b) in which it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(1) of the act, are given priority over all other cases in the office except other cases under section 10(1) of the act and cases of like character.

SEC. 101.33 *Initiation of formal action; settlement.*—If, after investigation, it appears to the regional director that the Board should determine the dispute under section 10(k) of the act, he issues a notice of filing of the charge together with a notice of hearing which includes a simple statement of issues involved in the jurisdictional dispute and which is served on all parties to the dispute out of which the unfair labor practice is alleged to have arisen. The hearing is scheduled for not less than 10 days after service of the notice of hearing. If the parties present to the regional director satisfactory evidence that they have adjusted the dispute, the regional director withdraws the notice of hearing and either permits the withdrawal of the charge or dismisses the charge. If the parties submit to the regional director satisfactory evidence that they have agreed upon methods for the voluntary adjustment of the dispute, the regional director shall defer action upon the charge and shall withdraw the notice of hearing if issued. The parties may agree on an arbitrator, a proceeding under section 9(c) of the act, or any other satisfactory method to resolve the dispute.

SEC. 101.34 *Hearing.*—If the parties have not adjusted the dispute or agreed upon methods of voluntary adjustment, a hearing, usually open to the public, is held before a hearing officer. The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board. All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions. The parties are permitted to argue orally on the record

before the hearing officer. At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute.

SEC. 101.35 *Procedure before the Board.*—The parties have 7 days after the close of the hearing, subject to any extension that may have been granted, to file briefs with the Board and to request oral argument which the Board may or may not grant. The Board then considers the evidence taken at the hearing and the hearing officer's analysis together with any briefs that may be filed and the oral argument, if any, and issues its determination or makes other disposition of the matter.

SEC. 101.36 *Compliance with determination; further proceedings.*—After the issuance of determination by the Board, the regional director in the region in which the proceeding arose communicates with the parties for the purpose of ascertaining their intentions in regard to compliance. Conferences may be held for the purpose of working out details. If the regional director is satisfied that the parties are complying with the determination, he dismisses the charge. If the regional director is not satisfied that the parties are complying, he issues a complaint and notice of hearing, charging violation of section 8(b) (4)(D) of the act, and the proceeding follows the procedure outlined in sections 101.8 to 101.15, inclusive.